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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term of 1987

JOSEPH Y. SATO, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Dated: July 13, 1987.

QUESTION PRESENTED FOR REVIEW

Did the District Court commit reversible error by denying the best evidence supporting Petitioner's defense as to willfulness?

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1. The caption in the style of this writ contains the names of all the parties to this proceeding, such parties being Joseph Y. Sato and the United States of America.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term of 1987

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v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Joseph Y. Sato, herein Sato, requests that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit and the subsequent denial of a Petition for Rehearing which affirmed the conviction of Sato on two counts of a three-count indictment for violations of 26 U.S.C. 7203, Willful failure to file a tax return.

Sato's appeal to this Court involves the issue of whether on a criminal charge in which the only theory of defense rests upon rebutting assertions of willfulness, the best evidence supporting the assertions of the defense may be excluded.

The opinions of the courts below have indicated that they believe that the rules of evidence may be so construed as to exclude such evidence.

Sato asserts that this manner of proceeding is a radical departure from the best evidence rule acknowledged by this Court and by virtually every other court. Sato further asserts that the sanctioning of such a departure by the appellate court requires this Court's power of supervision. Sato, therefore, urges this Court to so exercise its supervisory power in his case.

OPINIONS BELOW

There was no formal opinion from the District Court. The only formal opinion to be reviewed on certiorari is that of the United States Seventh Circuit Court of Appeals; see Exhibit B, Appendix. The denial of the petition for rehearing *en banc* was rendered on May 15, 1987; see Exhibit C, Appendix.

STATEMENT OF JURISDICTION

Jurisdiction of the trial court was taken pursuant to 18 U.S.C. 3231. Jurisdiction of the appellate court was taken pursuant to 28 U.S.C. 1291.

The opinion of the Seventh Circuit was rendered on March 16, 1987. The judgment was entered on that date. A Petition for rehearing, timely filed, was denied on May 15, 1987.

This Court has jurisdiction under 28 U. S. C. 1254(1) to issue a Writ of Certiorari to the United States Seventh Circuit Court of Appeals to review the judgment of that court and that jurisdiction is hereby invoked.

STATUTORY PROVISION INVOLVED

26 U.S.C. 7203:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than one year, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

A. PROCEEDING IN THE COURTS BELOW

This action was prosecuted as a criminal tax case by the United States Attorney's Office for the Northern District of Illinois upon a three-count indictment rendered on or about March 5, 1986, against Joseph Y. Sato for violations of 26 U.S.C. 7203, Willful failure to file income tax returns, for the years 1982, 1983 and 1984. Sato made a Motion to Withdraw and to Re-Set Pre-Trial Schedule on May 2, 1986, and another Motion for Extension on May 6 in order to be able to use attorney Andrew B. Spiegel as a witness and Lowell Becraft as his trial attorney, however, both motions were denied and Sato was forced to retain Ronald Boutwell as his attorney.

Sato's trial by jury was had on May 12-14, 1986. The United States presented evidence and testimony against Sato. The defense consisted of Sato's good-faith reliance upon his son's advice. Sato made a proffer of proof when the court denied documentation in support of his testimony against counts two and three. Only a stipulation was placed in evidence before the jury. Sato also presented the testimony of a character witness and of his son and other supporting documentation.

On May 14, 1986, the jury found Sato not guilty on count one, but guilty on counts two and three. On May 21, 1986, Sato made a Motion for a New Trial (see Document No. 26) on the ground of the trial court's refusal to permit Sato's exhibit before the jury. That motion was denied on May 22, 1986.

On June 30, 1986, the District Court imposed sentence upon Sato. On July 11, 1986, Sato filed a Motion for Reduction of Sentence based upon disparity which was denied on July 24, 1986.

Sato timely filed his Notice of Appeal and submitted his Appellate brief on September 17, 1986. Thereafter, Sato was granted oral argument, but his appeal was denied on March 16, 1987 (see Exhibit A, Appendix). Sato submitted a Petition for Rehearing In Banc on April 20, 1987, which Petition was denied on May 15, 1987. Sato petitions this Court upon that denial.

B. STATEMENT OF FACTS

In that the Sato's sole ground of defense was against any showing of willfulness that the prosecution might make (i.e.,

his good-faith reliance upon his son's advice), the defense agreed to stipulate to virtually all of the documentation which the prosecution intended to present. The witnesses for the prosecution were, thus, called for the purpose of authenticating or explaining documents.

The first prosecution witness, Mary Hanneman, a custodian of the records for the Internal Revenue Service in Kansas City, Missouri, explained and testified as to the authenticity of several documents related to Sato, purporting to show no record of return filed for each of the years in question. Hanneman further testifed about a set of documents purporting to show a consistent filing of returns on time for the years 1966 to 1977 for Sato. Hanneman testified that documents in her possession showed that notices inquiring about tax returns were mailed to Sato for 1982 and 1983. Hanneman testified that a "1040 Federal Income Tax Forms and Instructions for the Year 1982" was mailed to all individuals who filed in 1981 but did not specifically name Sato. Hanneman then testified that payment was made for taxes in the amount of $8995.44 on January 19, 1983.

On cross-examination, Ms. Hanneman testified that while the computer shows correspondence being mailed out, it does not reflect receipt of any answers. She further testified as to the procedure for acceptance of returns mailed into the Service Center.

The pre-trial stipulation was then read to the jury. Several prosecution exhibits were then admitted into evidence.

The prosecution's next witness, Thomas Lynch, an auditor for the Internal Revenue Service, explained and testifed, as an expert witness, to general principles of I.R.S. procedure and as to estimated computations and summaries with respect to Sato for the years 1982, 1983 and 1984 based upon returns made in 1978, 1979, 1980 and 1981. Lynch testified as to his estimations of taxes which Sato would owe in 1982, 1983 and 1984 if Sato made out his returns as Lynch "believed" that he would. After summarizing events pertinent to the prosecution's case, he then testified that Sato was required to file a 1040 form for those years.

On cross-examination, Lynch testified that it would have been "impossible for him to know" the deductions that Sato would have included on his return had he filed and that his computations were an estimate. Lynch further suggested that the I.R.S.

computer did not know what it was doing in assigning Mark Sato a representative number.

At that time, according to a prior agreement with the prosecutor, counsel for Sato attempted to put Sato's Exhibit No. 5, the Order from 81-2199, into evidence, however, counsel for the United States then objected and the document was not admitted into evidence. A proffer was made as to Sato's Exhibit No. 5. At that point, the prosecution rested.

Mr. Sato was then called to testify. His testimony reflected on the issue of willfulness and was made in authentication of some of the exhibits for the defense. He testified as to his background. Mr. Sato then testified as to his reliance upon his son, Mark, in preparing his 1040 returns starting with the 1978 return. He testified that he did not fully understand what his son was doing with his tax matters, but agreed that Mark would prepare and send in the returns. He further testified that he believed that his son was correct in his actions based upon his training.

Mr. Sato's Powers of Attorney granted to his son were admitted. Mr. Sato then testified as to their filing and to his intent to have Mark Sato represent him before the I.R.S. Mr. Sato then testified as to his impressions of the Order issued by this Court in Joseph Y. Sato v. Henry Yon, IRS Agent, 81-2199 (1983). Mr. Sato testified that after all the problems with the I.R.S. which had begun with the dispute over the powers of attorney, the Seventh Circuit had shown him that his son had been correct in that very first instance after a very long struggle, reinforcing his belief in his son. Mr. Sato then testified that the decision to not file was his son's.

On cross-examination, Mr. Sato testified that he did not believe that he had to file a return based upon several conversations he had with his son. Mr. Sato repeated his confidence in the Seventh Circuit's Order. Mr. Sato then testified as to his amended return of 1984 and to his infrequent reliance upon lawyers.

The next defense witness, Gus Sallas, Department Chairman of Washburne Trade School Automotive Center in Chicago, Mr. Sato's supervisor while he was employed, was called. He was called to testify to Mr. Sato's character. He testified that Mr. Sato "was always truthful, honest.... very punctual.... exemplary ... very good character.... did his job very well. Never had any problems." He further testified that

computer did not know what it was doing in assigning Mark Sato a representative number.

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Mr. Sato was law abiding as far as he knew.

On cross-examination, Mr. Sallas testified that Mr. Sato never tried to convince anyone else not to file.

Sato's son, Mark Sato, was then called to testify. Mark first testified as to his background. He then testified as to the background of the manner in which he began to handle his father's tax matters. Mark then testified that it was his decision to not file in 1982, 1983 and 1984. Mark confirmed his father's testimony concerning the powers of attorney filed with the I.R.S. Mark explained a chronological chart and then testified as to the events shown on the chart, which were the events followed upon the refusal of the I.R.S. to accept him as his father's representative.

On cross-examination, Mark testified as to his positions relative to the I.R.S. and to the decisions of the various courts in which his father's cases were heard. Mark then confirmed his father's testimony that Mr. Sato read the petitions but didn't fully comprehend them. Mark then testified that he had written all the correspondence to the I.R.S. for his father. Finally, Mark testified as to the reliance which had been placed upon the Sixteenth Amendment research which he had done.

The last witness for the defense, Paul S. Griffith, I.R.S. Special Agent, testified that he had met Mr. Sato and that, during his meeting, Mark Sato had "basically conducted all of the conversation" with him.

At that point, the defense rested.

The jury found Sato not guilty on count one, guilty on counts two and three.

On May 21, 1986, Sato made a Motion for a New Trial on the ground of the trial court's refusal to permit Sato's exhibit before the jury. That motion was denied on May 22, 1986.

REASONS FOR GRANTING THE WRIT

A. THE RULE OF BEST EVIDENCE

The rule of evidence commonly known as "the best evidence rule" is that the highest degree of proof of which the case from its nature is susceptible must, if accessible, be produced; or, in other words, that no evidence shall be received which presupposes that the party who offers it can obtain better evidence; see *Sebree v. Dorr*, 9 Wheat 558, 563 (1824). It is an old, but immutable, rule.

This Court has clearly stated the rule of best evidence *Gordon v. United States*, 344 U.S. 414, 420-23 (1953) (Certiorari to the 7th Cir.):

> For production purposes, it need only appear that the evidence is **relevant, competent, and outside of any exclusionary rule ...**
>
> * * *
>
> The elementary wisdom of the best evidence rule rests on the fact that **the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description ...** We hold that the accused is entitled to the application of that rule ... because it will best inform [the jury] as to the document's impeaching weight and significance.
>
> * * *
>
> **[T]his principle [of judicial discretion in the admission of evidence] cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony.** Reversals should not be based on trivial, theoretical and harmless rulings. But we cannot say that these errors were unlikely to have influenced the jury's verdict. We believe they prejudiced substantial rights and the judgment must be *Reversed*. (emphasis added)

It is well settled that the proceedings, orders, judgments, and decrees of courts of record cannot be proved by parol unless the record is lost or destroyed or is otherwise inaccessible, and a properly authenticated copy or transcript thereof cannot be obtained. *Weems v. George, et al.*, 13 How. 190, 197 (1851). This rule has been held to apply, even though the evidence is offered merely to prove the result of a judgment, and not the proceedings by which it was obtained, and to exclude parol

evidence of the mere existence of a judgment; see *Gaines v. De La Croix*, 6 Wall. 719, 73 U.S. 719, 720 (1867). A judicial record, or a properly authenticated copy or transcript, is the best evidence, and parol evidence is excluded by this rule, where it is sought to prove facts properly appearing of record in courts of criminal jurisdiction; 32A C.J.S. at 809; cf. *City Bank Farmers Trust Co. v. McGowan*, 43 F.Supp. 790, 793 (W.D. NY, 1942); *County of Macon v. Shores*, 97 U.S. 272, 277 (1877).

In *Lyon v. Perin Manufacturing Co.*, 125 U.S. 698 (1887), this Court considered two kinds of evidence of the same court document - one, the decree itself; and, two, a sworn and sealed "statement by the clerk of the Circuit Court of the United States for the Southern District of Ohio, (wherein the decree was rendered)." The Court decided that between the original document and the sworn statement, the trial court could only look to the original. *Lyon*, at 701-02.

In *Leech v. Armitage*, 2 Dall. 125, this Court laid down the rule that the record of a judgment is the best evidence of the cause of action, and parol evidence is not admissible to vary or contradict it. That rule was followed in *Ross v. M'Lung*, 6 Pet. 283 (1832), where the Court said, at 239, that "an attempt by parol testimony to vary a record [consisting of] an attempt to prove by the officer of the court, that his official certificate of probate, indorsed on the deed, did not conform to the true state of the proof [was] in such direct opposition to the settled rules of evidence, as to render it unnecessary to remark the danger of trusting to the memory in such a case after a lapse of thirty-five years." In other words, the attempt to substitute the original court document with testimony was so dangerous that noting the passage of thirty-five years was superfluous.

In *Bradstreet v. Thomas*, 12 Pet. 174, 177 (1838), this Court overturned the judgment of the trial court solely because of the trial court's rejection of court documents offered in evidence, stating:

> The footing upon which the rejection of the evidence is put by the court, is, that having frequently examined it in other trials, and considered it on a motion for a new trial, ... it had come to the conclusion, that the evidence tended in nowise to establish [the claims of the offeror] ... There is a safer repository of the

adjudications of courts, than the remembrance of judges; and their declarations of them is no proof of their existence.

* * *

[T]he error in rejecting [the papers] arose from the court's not having discriminated at the moment between judicial evidence of a fact, and the knowledge which it personally had of that fact in the course of its administration of the law.

If the "remembrance of judges" cannot be relied upon to prove even the existence of a court record, can a mere stipulation and the remembrance of a layman be relied upon to give weight and effect to the pronouncements of a court order? The trial court and the appellate court's apparent answer to that question has been in the affirmative.

B. THE ELEMENT OF WILLFULNESS AND PETITIONER'S STATE OF MIND

Willfulness is obviously a necessary element in the commission of the crime with which Petitioner was charged - Willful failure to file a tax return. In order to rebut an assertion of willfulness, it was, of course, necessary to show the jury the Petitioner's state of mind, Sato's reasons and motives for his acts which purported to violate the statutory provisions requiring the filing of a tax return. If the jury believed that a defendant had a state of mind which achieved the status of willfulness for the purpose of the alleged criminal act, then, of course, they would be apt to find the defendant guilty. In this case, Petitioner's willfulness was the only point of contention and the only point upon which Petitioner defended which made the issue of willfulness singularly important.

All of Petitioner's declarations concerning his state of mind at the time of those acts were made from his memory of his state of mind during that period. If that were the sum total of his assertions concerning his state of mind at that time, then that is all he could have asserted to rebut the charge of willfulness. Sato's testimony did not, however, hinge solely upon his own memory of his own state of mind concerning any requirement to file a tax return. The keystone of Petitioner's reliance defense for those years was his testimony concerning a six-page unpublished Order issued by the Seventh Circuit Court of Appeals in *Joseph Y. Sato v. Henry Yon, IRS Agent*, No. 81-2199 (7th Cir., December 29, 1983); see Exhibit A,

Appendix. His testimony was that his state of mind during the crucial period was in great measure a result of a good faith reliance upon his son, Mark, for advice, which was the case for each and every year for which he was charged. For the years 1983 and 1984, that good faith reliance was based in large measure upon that court order.

In that the jury found the Defendant "not guilty" for the first charge involving the first year of non-filing, but found him "guilty" for the second and third years, it necessarily required the jury to find Sato's willfulness to be sufficient for those two years and that his reliance upon his son was, thus, deficient in some regard. The jury's reasoning is, of course, something that we cannot know for certain. However, the prosecution's assertions that Sato knew of his obligations to file for many years prior to the first year of alleged criminal violation were apparently insufficient to overcome Defendant's assertions of reliance upon his son's advice for the first alleged violation. The question which goes unanswered is whether the jury would have found Sato's reliance upon his son's advice for the latter two years on which he was convicted less deficient to the point of acquittal had the best evidence in support of his testimony been admitted before them? Only the jury can answer such a question and only a jury can be allowed to answer such a question.

The fine line between the acquittal on the first year and conviction on the second and third years made the evidence demonstrating the validity of Sato's reliance upon his son's advice pertaining to the second and third violations particularly vital. The jury instructions made Sato's assertions of reliance upon his son even more vital; the jury instruction on reliance was read to the jury as follows:

> Defendant has testified to his belief in his son and reliance upon his son's advice and his son's decision not to file his 1982, 1983, and 1984 tax returns. If you find that said beliefs or reliance were the result of a good faith misunderstanding of the law and that his good faith was reasonable, then you must find Sato not guilty. Alternatively, if you find that his conduct was negligent, or inadvertent, then you must also find him not guilty.

This jury instruction admits to the relevance of the actual Order since Sato based his reliance upon his son's advice for the years 1983 and 1984 upon that Order. Without that Order, it was

impossible for the Petitioner to have proven the source of his good faith and any reasonableness in that good faith.

C. The Evidence Denied was an Important Support for Petitioner's Reliance Defense

It must go without saying that the order of a court must be held competent for a layman like Sato to have relied upon such an order giving credence to his own son's assertions about the rectitude of his positions since his son's efforts brought about the order. However, even though the order was nearly admitted, only a stipulation was finally admitted to the jury, which read as follows:

> Mark Sato was qualified to represent his father at the audit conference for the taxable years 1976-1979, yet I.R.S. Agent Henry Yon refused to allow him to do so.
>
> Joseph Sato was notified of this fact by the United States Court of Appeals for the Seventh Circuit on or about December 29, 1983, as a result of a lawsuit filed by Mr. Sato in 1980.

In contrast with the appearance and language of the actual order, the stipulation pales in comparison, especially to a layman like Sato and to his peers on the jury. Whether, to the legally trained mind, an order of a court should be considered so unimpressive as to be of doubtful relevance cannot be an issue here; it is to the members of the jury, laypeople all, that the weight and power of any document to influence a defendant's state of mind should be presented.

The Order of the Seventh Circuit was impressive to Sato. The response of the jury, Sato's peers, to the document may very well have been the same. Instead, they were forced to speculate on exactly what it was about the Order that impressed the Defendant. In *Moore v. Chesapeake & O. R. Co.*, 340 U.S. 573, 578 (1950), this Court (quoting *Galloway v. United States*, 319 U.S. 372, 395) asserted that "[s]peculation cannot supply the place of proof." In a civil case, *Columbia Metal, etc. v. Kaiser Alum., etc.*, 579 F.2d 20 (CCA3 1978), the court stated, at 25, that:

> Where the issues are ones for resolution by the jury, the judge may deprive the jury of its role at trial only where such action is necessary to guard against a verdict founded solely on "mere speculation."

In this case, the jury could only speculate about the visual and

verbal impact the Order may have had upon the Defendant's state of mind since it was not allowed to see it. In *Levin v. Katzenbach*, 363 F.2d 287 (CCADC 1965), the court, at 291, stated that:

> [A]ppellant would be entitled to relief in the present case if the government failed to disclose evidence which, in the context of this case, **might** have led the jury to entertain a reasonable doubt about appellant's guilt. (emphasis added)

The issues which were described by the order issued in Sato's case were far more wide-ranging than the stipulation could possibly have shown and did not show. The error in attempting to substitute a two-paragraph statement for a six-page court order should be apparent on its face. According to Sato's testimony, he had been impressed with the Order because he believed that it showed that his son had been right in the very first instance of a dispute with the Internal Revenue Service which had occurred far in advance of the criminal prosecution. Although the Seventh Circuit was perplexed over the conduct of both litigants in 81-2199, the Order rebuts the contention of the United States and of the District Court that the suit was barred on sovereign immunity grounds (Order at 5). The Seventh Circuit order went on to state that the position of Sato was perfectly clear (Order at 3), that Sato had made adequate allegations to sustain the suit in the District Court (Order at 4), but that the issue was moot because the case had progressed beyond that point at which relief could have had meaning (Order at 5-6). In conclusion, the Seventh Circuit laid the blame for the problem in that case upon the unwillingness of the I.R.S. to settle what was a minor dispute. None of those statements, as presented in the document and which greatly influenced Sato's state of mind relative to his reliance upon his son, were admitted before the jury. Sato's declarations concerning how that Order affected his state of mind could only have been adequately supported by the Order itself. Under the rule laid down by this Court in *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 296 (1892), it was error to deny such support for the defense:

> The rule applicable to this case has been thus states by this court: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such

feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent explanatory or corroborative evidence, it is often **indispensable** to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury." *Insurance Co. v. Mosley*, 8 Wall. 397, 404, 405. (emphasis added)

Sato's reliance upon that document relative to his belief in his son's capabilities made its admission into evidence crucial. To have refused that document into evidence and to have only allowed a stipulation was a reversible error. It was rather like the difference between being allowed to actually listen to a stirring piece of music played by a full ensemble and only being able to hear the musical theme played as a one-note melody. Ordinary people are unable to fill such a void in the accompaniment in music, or in the huge blanks in the kind of stipulation which was given to the jury. Sato was, thus, deprived of the chief benefit of that documentation, going to the heart of the defense against the issue of willfulness.

The fact in dispute in the trial court was the Sato's willfulness. The reliance of Sato upon said Order of the Seventh Circuit Court of Appeals was indispensable to his ability to dispute the accusations of willfulness made against him in the court below for counts two and three. That Order was the best evidence upon which Sato relied in good faith that his son's advice was correct. The fact in dispute could not be fairly settled without that written document. In *Sylvania Electric Products, Inc. v. Flanagan*, 352 F.2d 1005, 1007 (CCA1, 1965), the court stated that:

> It is well settled that the best evidence that is obtainable in the circumstances of the case must be adduced to prove any disputed fact. United States v. Alexander, 326 F.2d 736 (4th Cir. 1964).

That court went on to say, *id* at 1008:

> In proving the terms of a writing, which terms are material to the issues in the case, the original writing must be produced unless it is shown to be unavailable for some reason other than

the serious fault of the proponent. McCormick, Evidence Section 196 (1954). Upon a proper showing of the unavailability of the original writing, secondary evidence of its contents may be received. However, secondary evidence of the content of the original is not admissible unless the proponent of the testimony shows that a reasonable and diligent search has been made for the original without success.

He who seeks to introduce secondary evidence must show that he has used all reasonable means to obtain the original, I.E., such search as the nature of the case would suggest. The best evidence rule should not be applied as a mere technicality. But where the missing original writings in dispute are the very foundation of the claim, which is the situation in this case, more strictness in proof is required than where the writings are only involved collaterally.

For Sato, the order of the Seventh Circuit was most assuredly not a collateral issue, but was part of the foundation of his defense for 1983 and 1984.

Any assertion to an exclusionary privilege because the Seventh Circuit Order was not to be cited is defeated in light of the decision in *United States v. Certain Parcels of Land*, 15 F.R.D. 224, 230-31 (S.D. CA Central Div., 1954), in which the court asserted that:

> The trial of any cause, criminal or civil, is an orderly quest for truth. The age-old policy of our common-law system of justice has been to insist that only the best evidence available be employed in that quest.
>
> As Sir William Blackstone clearly expressed it, "the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed."
>
> * * *
>
> In criminal cases, the public interest in compelling the best available evidence and the constitutional right of the accused to compel the production of all evidence "in his favor", U.S. Const. Amend. VI, may combine to outweigh any evidentiary privilege which the Government can assert. [cites]

D. THE BEST EVIDENCE WAS REQUIRED TO BE ADMITTED

Because the original document was available and proffered to the trial court, that court was without authority to

permit an inferior degree of proof of Sato's assertion as to willfulness to be introduced to the jury; see *Simpson & Co. v. Dall.*, 3 Wall. 460, 474 (1865). The determination of the weight and sufficiency of the facts offered by Sato on his own behalf are strictly for the jury to decide; it was not within the province of the trial court to make the determination for the jury. In *Mesarosh v. United States*, 352 U.S. 1, 12 (1956), this Court stated that:

> Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case. ... [I]f on a remand the District Court should rule that the verdict against some of the petitioners could stand, we would be obliged, on a subsequent appeal, to reverse and, at that late date, direct that a new trial be granted.

See also *United States v. Laub*, 12 Pet. 1, 5 (1838). All evidence which makes any showing, however slight (see *United States v. Federico*, 658 F.2d 1337 (CCA9 1981)), to support a defendant's assertion of his state of mind, is the province of the jury such that even when it's "almost impossible" for evidence to vindicate a defendant's position, it must be considered relevant and is strictly a matter for the jury to decide. The ability of a criminal defendant to present evidence on his behalf is, furthermore, not to be narrowly construed, but broadly construed. Disclosure of more than is required "will help [the judicial process]"; see *Imbler v. Pachtman*, 424 U.S. 409, 443 (1975) (White, J., concurring).

In *Clifton v. United States*, 4 How. 242, 247-48 (1846), this Court found that where the primary evidence is missing, a presumption may be raised that, if such primary evidence was produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party holding back such evidence; see also *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939) and *Runkle v. Burnham*, 153 U.S. 216, 225-6 (1894). Sato is entitled to that presumption and is entitled to a remand for a new trial.

CONCLUSION

The courts below have justified the denial of Mr. Sato's best evidence on the ground that it is not relevant. That reasoning cannot have support because of the simple fact that the Petitioner was acquitted on the first count of a multi-count indictment, the count least likely for him to have been found innocent based upon all the evidence given by the Plaintiff. The prosecution stressed Mr. Sato's long-running record of timely filing to support their charge that he knew that he was required to file. In view of the acquittal on the first count, it's apparent that the jury wasn't buying that reasoning completely. Would the jury have also acquitted on the second and third counts had they been allowed to see just one more piece of evidence, however small, tending to support Mr. Sato's faith in his son? Unfortunately, unless this Court exercises its supervisory powers, that question will never be answered because the trial court left the jury to decide Mr. Sato's guilt or innocence without that one more bit of evidence.

Petitioner hereby submits that, if the best evidence rule may be mistreated as it was in his case, then the American system of justice will lose a great brick out of its bulwark. It may seem like such a small thing to let one individual be convicted on a deficient body of evidence and yet, somehow, that's just what the judiciary is supposed to prevent. No harm to justice would have resulted from the admission of that best evidence, but a great harm to the entire system may be done if the innocent are divested of their stock of exculpatory facts which are, by definition, limited.

The rules of evidence must not be used to restrict the ability to put on a full, complete defense. One way to keep on insuring that situation is to keep the best evidence rule from being eroded even the least bit.

For all the foregoing reasons, Petitioner respectfully requests that the writ be granted.

Respectfully submitted this 13th day of July, 1987.

Lowell H. Becraft, Jr.
Counsel for Petitioner
Joseph Y. Sato
209 Lincoln Street
Huntsville, AL 35801
(205) 533-2535

DECLARATION OF PROOF OF SERVICE

I, Mark Sato, under 28 U.S.C. 1746, do affirm and declare that a copy of the foregoing Petition and attached Appendix, as corrected, was served on the Solicitor General, Department of Justice, Washington, D.C. 20530 and on the United States Attorney at 219 South Dearborn, Chicago, Illinois 60604 on August ____, 1987, by depositing such copy in a United States postal mailbox, with first-class postage prepaid in accordance with Rule 28.3 and Rule 28.4 (a) of the Rules of the Supreme Court of the United States.

And further declarant sayeth not.

I affirm that the foregoing is true and correct.

_____

Mark Sato

Subscribed and declared before me, a Notary Public, on this ____ day of August, 1987, by the above named Mark Sato, who is personally known to me to be the same person who has affixed his signature above.

_____

Notary Public

APPENDIX

EXHIBIT A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 14, 1983*
December 29, 1983.

Unpublished Order not to be cited
per circuit Rule 35

Before
Hon. William J. Bauer, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. John L. Coffey, Circuit Judge

JOSEPH Y. SATO,

Plaintiff-Appellant,

No. 81-2199 vs.

HENRY YON, IRS Agent,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 80 C 5158 - John F. Grady, *Judge*.

ORDER

[* - footnote on oral argument deleted.]

Pro se plaintiff-appellant appeals from the order of the district court dismissing his complaint against IRS Agent Yon on the ground that the action was really a suit against the United States and as such was barred by sovereign immunity.

I.

The facts are very sketchy; since the case was dismissed on the pleadings, none were developed in the trial court. Nevertheless, the following are the facts as pieced together from appellant's briefs and memoranda, and we take them as true, as we must, for purposes of a motion to dismiss. Plaintiff-appellant Joseph Sato was audited by the IRS for the taxable years

1976-1979, and wanted his son, Mark Sato, to represent him at the audit conferences.*1/* A power of Attorney (IRS Form 2848), unnotarized but properly witnessed and signed by Joseph Sato, was filed April 23, 1980. Treasury Circular No. 230, subtitle A, Part 10, "Practice Before the Internal Revenue Service," provides guidelines concerning who may "practice" or represent taxpayers before the IRS. Section 7 allows "limited practice without enrollment." Section 10.7(a)(1), 31 C.F.R. Section 10.7(a)(1), provides that an individual who presents proper identification and authorization may "represent without compensation a member of his immediate family." It would seem that Mark Sato was qualified to represent his father (and the government concedes as much on appeal), yet Agent Yon refused to allow him to do so. Mr. Sato appends to his appellant's brief a copy of a hand-written note, purportedly written by Agent Yon, stating that "Power of attorney not valid - son not CPA or enrolled agent. Can only act in capacity of witness." This on its face is inconsistent with both IRS policy and the instructions for Form 2848. Despite repeated requests, Mr. Sato never obtained an explanation for the denial, or permission for his son to appear on his behalf. The government agrees that in fact Mark Sato never did represent his father. Mr. Sato further claims that after the audit conferences, at which he was not represented, the IRS arbitrarily and erroneously assessed deficiencies of more than $7000.*2/*

1/ As we understand it, Mr. Sato did not want to appear at all, and wanted his son to attend the audit conference in his place, i.e., to "represent" him. His son could have accompanied him without any permission from the IRS.

2/ A deficiency of $7445.88 plus a 5% penalty was assessed for 1978. On the petition before the Tax Court, Mr. Sato did not challenge the deficiency determination, but argued only constitutional issues. On appeal to this circuit (*Sato v. Commissioner*, No. 82-1455), Mr. Sato again did not challenge the deficiency determination; he merely argued that Section 6014 of the Internal Revenue Code (which allows certain low income taxpayers to elect to have the IRS compute their taxes) barred the IRS from reviewing his return. We summarily rejected that argument by unpublished order dated September 28, 1983. We do not know what has become of the 1976, 1977 and 1979 tax years.

On September 23, 1980, Mr. Sato brought suit to compel Agent Yon "to show cause for his refusal to recognize the Plaintiff's grant of power of attorney to MARK SATO." Jurisdiction was premised on 28 U.S.C. Section 1346(a)(2).*3/* The government filed a motion to dismiss, pursuant to Rule 12(b)(6), Fed. R. Civ. P., arguing that the real defedant was the United States which had not consented to be sued. In response, Mr. Sato has variously asserted that a) this is not a suit against the United States, b) this is a controversy to which the United States is indirectly a party, rather than controversy directly involving the United States, c) the United States was a party to the original "Show Cause" motion only in that it was necessary to identify defendant Yon as an IRS agent, and d) that Ageny Yon is the real defendant because he personally exceeded his statutory in refusing to recognize Mark Sato's power of attorney.

These inconsistent theories merely seem to be the result of Mr. Sato's attempts to stay one step ahead of the govern-

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3/ Section 1346(a)(2), the Tucker Act, is clearly an inappropriate basis for jurisdiction. It permits suits in district court for certain contract damages not exceeding $10,000. On appeal, Mr. Sato predicates jurisdiction on 28 U.S.C. Section 1340. This basis for jurisdiction is equally unavailing. Section 1340 is relevant to actions arising under any Act of Congress providing for internal revenue; Mr. Sato's claim is predicated on the failure of the IRS to follow its own regulations, not on any Act of Congress. See *Einhorn v. DeWitt*, 618 F.2d 347 (5th Cir. 1980). However, under Rule 8(a) of the Federal Rules of Civil Procedure, it is not essential that a complaint set forth the statutory basis for the court's jurisidction if the facts alleged provide the basis for the court's assumption of jurisdiction. *Loss v. Blankenship*, 673 F.2d 942, 950 (7th Cir. 1982). We conclude that Mr. Sato has adequately alleged facts conferring jurisdiction for actions arising under the Constitition. He alleges a due process violation in that the IRS failed to follow its own procedures. As the Supreme Court noted in *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), "it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."

ment's arguments in seeking to dismiss the case - on technical jurisdictional grounds that we would not expect a pro-se litigant (who cites his "extensive inexperience") to handle more artfully. Mr. Sato's position in the complaint is nevertheless perfectly clear: He seeks an explanation from the IRS as to why his son was barred from representing him.

II.

The question of sovereign immunity is, as this circuit has put it, "one of the more ill-defined aspects of federal jurisdiction." *Schlafley v. Volpe*, 495 F.2d 273, 277 (7th Cir. 1977). Not every suit against the government is barred by sovereign immunity, and the exceptions to the doctrine are themselves riddled with exceptions.

The inquiry begins with *Land v. Dollar*, 330 U.S. 731, 738 (1947), which held that whether or not the United States is named as a defendant, the suit is considered to be against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration." This doctrine was clarified in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1948) for cases seeking specific relief rather than money damages. The *Larson* court carved out two exceptions to the applicability of sovereign immunity, holding that a suit against the government officer in his official capacity is not a suit against the sovereign if (1) the officer's powers are limited by statute and his actions were *Ultra Vires*, or (2) the officer was acting unconstitutionally, or pursuant to an unconstitutional grant of power.*4/* This holding of *Larson* was in turn qualified by its famous (or infamous) footnote 11, 337 U.S. at 691; the suit may yet fail if it would "require affirmative action by the sovereign...."

We think that Mr. Sato has adequately alleged that Agent Yon's conduct was *ultra vires*. Plaintiff has alleged not merely error in the exercise of delegated power, but a decision that is inexplicable if the facts are indeed as plaintiff presents them. The remaining question then, is whether the *Larson* footnote

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4/ The conclusion that the suit is not against the government is, of course, a legal fiction. Relief is sought not from a particular governmental functionary, but from the agency. In the case before us, Mr. Sato wants his son to represent him - before any agent who happens to be assigned the audit file.

11 nonetheless bars the suit. In *Schlafley v. Volpe*, 495 F.2d 273, 280 (7th Cir. 1974), we followed the Ninth Circuit's decision in *State of Washington v. Udall*, 417 F.2d 1310, 1318 (9th Cir. 1969) and concluded that even a suit seeking "affirmative action" was not barred unless "the relief sought would work an intolerable burden on governmental functions, outweighing any consideration of private harm." In *Schlafley*, we reversed the dismissal on sovereign immunity grounds of a suit seeking to compell the expenditure of authorized, yet frozen, federal highway funds. Our analysis was further extended in *Clark v. United States*, 691 F.2d 837 (7th Cir. 1982), a suit requesting a declaratory judgment under the "unconstitutional action" prong of *Larson*. We concluded that a declaratory judgment was simply a request for a declaration of rights, and as such imposed no burden, intolerable or otherwise, on the sovereign. (In *Clark* there was no need to consider whether a declaratory judgment would entitle plaintiffs to affirmative relief that would in turn work an intolerable burden on the government.)

In light of these decisions, we conclude that Mr. Sato is seeking only a declaratory judgment (of his right to representation by his son), and that such a declaration would impose no intolerable burden on the government. We also note that even if, as a result of a declaratory judgment, the IRS were required to allow Mark Sato to represent his father, the necessary "affirmative action" would itself impose no burden on the government. Because IRS regulations permit the taxpayer to be represented when the IRS conducts an audit conference, a requirement that a particular individual be the representative adds nothing to the burden already assumed by the government.*5/* We conclude that the district court erred in dismissing the suit on sovereign immunity grounds.

III.

With these jurisdictional questions to one side, the remaining question is whether Mr. Sato can at this late date still maintain a declaratory judgment action for the purpose of asking why his son was not allowed to represent him. We conclude that he cannot. As Mr. Sato explains in his brief on appeal,

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5/ Of course, in view of Mr. Sato's apparent lack of interest in litigating the merits of his cases, we aren't sure that it makes much difference who represents him.

the audit conferences are long since over.6/ The record does not indicate the dates of the audit conferences, and it is quite possible that there was still a live controversy at the time this suit was filed; i.e., a declaration of his right to his son's representattion could have resulted in an order directing the IRS to allow his son to represent him. Now, however, the whole issue is moot. The audit conferences for the tax years specified in the power of attorney are over, and we have no reason to think that in the course of future audits, Mr. Sato will be inexplicably denied representation by his son after the new power of attorney is properly signed and notarized. This is not a situation capable of repetition yet evading review. Neither is there any request that Mark Sato should be allowed to represent his father before the Tax Court, through which the three other tax years at issue in the audit conference may still be wending their way. Thus at this point no ruling either way on the merits of the declaratory judgment could have any effect on anything; there is no case or controversy. Any decision would thus be advisory, and the federal courts are without jurisdiction to enter such a decision. We accordingly dismiss the appeal as moot.

IV.

Finally, we fail to understand what this case is doing in federal court, taking up valuable time and effort in the district court and this court, not to mention diverting tax dollars to the preparation of the government's lengthy brief on the question of sovereign immunity. This matter should have been resolved at the agency level a long time ago. If the whole problem arose because the power of attorney form was not notarized, Mr. Sato should simply have been told to come back with the form in proper order. While Mr. Sato may well have filed suit

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6/ Recognizing the unavailability of specific relief, he instead requests monentary damages of three times $7818.17 (the deficiency assessed for 1978, and sustained by the Tax Court and this Circuit). Aside from the fact that this argument was not presented to the district court, there is no basis for arguing that the Tax Court judgment was itself tainted by inadequate representation at the audit level. Tax Court proceedings are de novo. (That is why the courts generally will not look behind a notice of deficiency.) See *Greenberg's Express*, 62 T.C. 324, 328 (1974).

precipitously, without attempting to resolve this problem at the agency level, it is incumbent upon the IRS to attempt to settle minor disputes without litigation. Such disposition of this minor dispute would have saved the public treasury from unwarranted depletion.

APPEAL DISMISSED.

EXHIBIT B

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2197

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH Y. SATO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 86 CR 157-1—**Nicholas J. Bua,** *Judge Presiding.*

ARGUED DECEMBER 10, 1986—DECIDED MARCH 16, 1987

Before COFFEY and EASTERBROOK, *Circuit Judges,* and GRANT, *Senior District Judge.**

GRANT, *Senior District Judge.* Joseph Y. Sato appeals from his conviction and sentence on two counts of a three-count indictment charging him with willful failure to file federal income tax returns. After the jury returned its verdict and the district court denied Sato's motion for a new trial, the court sentenced Sato to three years of probation with the condition that Sato pay back taxes in the amount of $7,172.96, plus interest and penalties, and file tax returns during the period of probation. The court also

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

imposed a $20,000 fine to be paid during the period of probation and, thereafter, denied Sato's motion for reduction of sentence. Sato now appeals.

I

For fifteen years prior to the 1982 tax year, Sato dutifully filed federal income tax returns and usually without incident. In the years 1978 through 1981, Sato's son, Mark, prepared Sato's tax returns, which included deductions for the "Sato Family Trust." These deductions became the focus of IRS audits. The trust deductions were disallowed and the IRS notified Sato of additional taxes due. Ultimately, the United States Tax Court dismissed two petitions Sato filed to challenge disallowance of the 1978, 1979 and 1980 trust deductions. The decisions of the Tax Court are not an issue here.

Sato failed to file tax returns for the 1982, 1983 and 1984 tax years. At trial on criminal charges of willful failure to file tax returns, 26 U.S.C. § 7203, Sato offered as a principal theory of defense that he relied on his son's advice with respect to tax matters and, therefore, the government could not prove Sato "willfully" failed to file. Specifically, Sato contends his son made the decision not to file, and an unpublished Order of this Court was pivotal in "reinforcing his belief in his son." Appellant Br. at 8. Mark testified at trial that he represented his father on all tax matters.

II

Sato argues it was reversible error for the district court to allow only a stipulation to a document, rather than allowing it into evidence. The document, an unpublished Order of this Court (*Sato v. Henry Yon*, No. 81-2199, Dec. 29, 1983), concerned the ability of Sato's son to represent his father during the earlier IRS audit. According to Sato, the Order would offer to the jury a persuasive explanation for his reliance on the judgment of his son on tax matters. Because Sato's defense in this criminal tax case

was premised upon the good faith reliance on the advice of his son, he argues the court was "without authority" to deny admission of a document providing the best proof that he did not "willfully" fail to file a return. We believe Sato has failed to show the district court abused its discretion in refusing to admit the document. We will not reverse an evidentiary ruling of the district court unless we are convinced the court abused its discretion. *United States v. Harris*, 761 F.2d 394, 398 (7th Cir. 1985).

Relevance is doubtful under Fed. R. Evid. 401. To make a case for relevance, Sato must argue that the unpublished Order would help to explain to the jury why his reliance on his son justified his failure to file tax returns. The Order would be relevant if its subject matter touches upon something affecting Sato's state of mind, or specifically, operates to negate a finding of willfulness.

In this tax case setting, willfulness is defined as "a voluntary, intentional violation of a known legal duty." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). *See United States v. Verkuilen*, 690 F.2d 648, 655 n.8 (7th Cir. 1982). Although the government need not show *mens rea*, or that Sato had an "evil-meaning mind," *Morrissette v. United States*, 342 U.S. 246, 251 (1952), a finding of willful conduct "would necessarily negate any possibility of 'good faith' in failing to file." *United States v. Moore*, 627 F.2d 830, 833 n.1 (7th Cir. 1980). Typically, defendants have argued that a particular instruction to the jury on the meaning of "willful" conduct leaves no room for making out a good faith defense. *E.g., United States v. Verkuilen*, 690 F.2d 648 (7th Cir. 1982). Ours is a different, but similar, problem. Sato contends the unpublished Order is legally relevant to his good faith defense for failing to file tax returns. He insists suppression of the Order denies his defense.

This Court has recognized that only an inadvertent failure to file or a bona fide misunderstanding of the duty to make a return constitutes justifiable excuse under the meaning of "willful" in 26 U.S.C. § 7203. *United States*

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v. Matosky, 421 F.2d 410, 413 (7th Cir.), *cert. denied*, 398 U.S. 904 (1970). Sato has made no claim that his was an inadvertent failure to file. A bona fide misunderstanding of the duty to file, on the other hand, might be framed as a "mistake of law" defense which, according to this Court, succeeds or fails on the standard of objective reasonableness. *United States v. Foster*, 789 F.2d 457, 461 (7th Cir. 1986); *United States v. Moore*, 627 F.2d 830, 833 (7th Cir. 1980). We conclude it would be almost impossible for a taxpayer to reasonably believe that the contents of the Order suggest Sato is excused from filing an income tax return. The Order simply states the son may represent Sato during the earlier IRS audit; in no way does the Order make the existence of good faith more or less probable. The Order does not and could not, reasonably, create any bona fide misunderstanding of the duty to file tax returns. Because the Order was not relevant to Sato's defense, it was within the district court's discretion to refuse to admit the document in evidence. Moreover, we find particularly comforting the decision of the district court to place no limitations on Sato's testimony concerning the contents of the Order or his reliance on his son.

III

Sato contends the district court abused its discretion in imposing the $20,000 fine. He argues that once his Rule 35 motion for reduction of sentence was made and denied, the court was required to issue a full statement of reasons. Sato insists the court should have considered a broader range of sentencing factors, something more than his lack of repentance and the presentence investigation report. Specifically, he suggests the district court should have considered his advanced age of 69 years, ill health—including hearing, walking, and prostate problems—his forced internment during World War II as a Japanese-American, as well as the "disparity" between the sentence he received and that received by a similarly situated defendant in another case. As a "model citizen," Sato sug-

gests he already has paid any debt that society might demand of him.

The sentencing judge enjoys wide discretion in sentencing, *United States v. Marquardt*, 771 F.2d 771, 781 (7th Cir. 1986); *United States v. McCoy*, 770 F.2d 647, 648 (7th Cir. 1985), and the sentence imposed by a district court will not be upset unless it violates applicable statutory limits or the district judge has abused or failed to exercise sentencing discretion. *United States v. Jones*, 808 F.2d 561, 570 (7th Cir. 1986) (citing *United States v. Allen*, 797 F.2d 1395, 1402 (7th Cir.), *cert. denied*, 107 S.Ct. 196 (1986); *United States v. Mitchell*, 788 F.2d 1232, 1237 (7th Cir. 1986)). Sato's sentence of 3 years probation and a $20,000 fine falls well within the maximum penalty under law for conviction on two counts, a combined two years of imprisonment and a $50,000 fine. 26 U.S.C. § 7203. As a sentence imposed within the statutory limits, Sato's sentence is reviewed on appeal only for evidence of a failure to exercise discretion, or for evidence of a reliance on improper or unreliable information. *United States v. Main*, 598 F.2d 1086, 1094 (7th Cir.), *cert. denied*, 444 U.S. 943 (1979).

Nothing on the record suggests the district court abused or failed to exercise its discretion. We have no indication the sentencing judge considered improper or unreliable factors. When the judge states he read the presentence investigation report, we should presume he considered the matters raised therein. The report was accurate, and it contained proper information, with the minor exception that the parole information was based on the offense of tax evasion rather than the failure to file. The judge stated he would not rely on this information, and we do not consider it the type of "factual inaccuracy" that must be remedied by compliance with Fed. R. Crim. Pro. 32(c)(3)(D). *See, e.g., United States v. Reynolds*, 801 F.2d 952, 957 (7th Cir. 1986). Moreover, there can be no doubt the sentencing judge may consider the serious nature of the offense, the potential for deterrence through punishment, and whether the defendant is contrite. Because the judge's

discretion in this area is necessarily broad, we are not in a position to question the relative emphasis a sentencing judge places on one factor over another. We are convinced the district judge considered a broad range of factors before sentencing Sato. Much to Sato's favor, in fact, the court noted Sato's lack of criminal experience as well as his wartime internment. Incarceration, therefore, was considered too severe. In short, the sentencing judge read the presentence investigation report and imposed sentence, detailing some, but not exhausting, the factors he considered. Without any showing that these factors were unreliable, we are content to hold that the district court properly exercised its discretion in imposing sentence.

We acknowledge that the Sentencing Reform Act of 1984 attempts to promote uniformity in sentencing by requiring judges to defer to the guidelines established by the U.S. Sentencing Commission. The 1984 Act represents a sudden curtailment of judicial discretion; it requires narrower sentencing ranges and authorizes appeals of sentences imposed outside the ranges. Nonetheless, the 1984 Act was not yet effective at the time of Sato's sentencing. We note that, although we are satisfied the district judge gave Sato a full explanation of reasons for his sentence, the new law may require more of a statement from the sentencing judge. 18 U.S.C. § 3553(c). Sentencing judges may also have to give fuller attention to the alleged "disparity" between sentences of similarly situated defendants. 18 U.S.C. § 3553(a)(6). For now, however, Sato must advance such arguments in general terms of abuse of discretion, and we are convinced it was within the district judge's discretion to find that the facts of the case Sato refers us to, *United States v. Dubrovich*, 86 CR 156 (N.D. Ill. 1986) (five years probation, no fine), are different enough to warrant a different sentence for Sato.

IV

As a final contention, Sato argues that the fine imposed by the district court contravenes the eighth amendment of the United States Constitution. ("Excessive bail shall

not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.) He claims that despite the existence of the upper limit of the statutory fine, the fine imposed is "excessive" in the context of his ability to pay. We might envision the extremely rare case wherein the fine imposed might be excessive and unconstitutional solely in terms of the defendant's resources. But this is certainly not the case. In fact, the record is silent on the question of Sato's ability to pay the fine. Rather than trigger a question of constitutional dimension, evidence of Sato's ability to pay would be a matter for consideration within the discretion of the sentencing judge. The new sentencing law would confirm such an approach to imposing a sentence of fine. 18 U.S.C. § 3572(a)(1).

In constitutional terms, Sato contends the punishment is grossly disproportionate to the severity of the crime. The government has referred us to a number of cases upholding, against arguments of disproportionality, sentences of fine and imprisonment for failure to file income taxes. *United States v. Shaffer*, 291 F.2d 689, 694 (7th Cir.), *cert. denied*, 368 U.S. 915 (1961) ($5,000 fine, one year incarceration); *Martin v. United States*, 317 F.2d 753, 755 (9th Cir. 1963) ($1,000 fine, one month incarceration); *United States v. Overton*, 359 F.2d 28, 29 (4th Cir. 1966) ($5,000 fine, 3 months incarceration); *United States v. Campbell*, 619 F.2d 765, 767 (8th Cir. 1980) ($1,500 fine, six months incarceration). Not only are these cases quite different from the present case in that Sato's sentence does not include incarceration (and thus, his argument is probably even weaker, considering he has suffered no deprivation of liberty), but Sato has not offered any case which supports his constitutional argument or which counters the cases offered by the government. He cites *Weems v. United States*, 217 U.S. 349 (1910), but that case involved a barbarous, antiquated form of incarceration and is immediately distinguishable.

Sato's case is further weakened by the state of the law on proportionate punishment. All the Supreme Court

Justices would agree that proportionality is a proper subject of inquiry in capital cases. The Court has acknowledged that the penalty of death is different *in kind*. However, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). This lack of success stems in large part from the substantial deference appellate courts properly accord to legislatures and sentencing courts in their efforts to mete out just punishment, whether light or heavy, discretionary or determinate.

A triad of cases fairly represents the Supreme Court's recent attempt to apply the eighth amendment to noncapital sentences. *Rummel v. Estelle*, 445 U.S. 263 (1980), held that a life prison term under the Texas recidivist statute was not a grossly disproportionate sentence for a third felony conviction, the last being for the crime of obtaining $120.75 by false pretenses. *Hutto v. Davis*, 454 U.S. 370 (1982), held that a forty-year prison term and a $20,000 fine was not an unconstitutional sentence for a conviction on charges of possession with intent to distribute a small amount of marijuana. In *Solem v. Helm*, 463 U.S. 277 (1983), however, the Court found life imprisonment without parole to be an unconstitutionally disproportionate sentence, although the sentence was triggered under the South Dakota recidivist statute by a seventh nonviolent felony, the last being the utterance of a "no account" check. These cases sharply divided the Court on the fundamental question of the role of appellate courts in reviewing prison sentences for proportionality.

Despite the disagreement among the Justices, the cases appear to establish a few certain principles. Most fundamentally, although substantial deference is due the legislatures and sentencing courts, "[n]o penalty is *per se* constitutional." *Solem*, 463 U.S. at 290. However, the concern of an appellate court should be only the occasional "manifestly unjust" sentence, *Hutto*, 454 U.S. at 377 (Powell, J., concurring), or in the more restrictive words of then Chief Justice Burger, appellate review for propor-

tionality is proper "only in extraordinary cases, *Weems* being one example and the line of capital cases another." *Solem*, 463 U.S. at 313 (Burger, C.J., dissenting). In *Weems*, the Court held unconstitutional a fifteen year sentence of *cadena temporal* (imprisonment with hard labor and permanent loss of civil liberties), finding the punishment to be disproportionate to the crime of falsifying a public document. In the capital cases, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. *E.g.*, *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977).

This case does not present the issue of whether *Weems* is a subset of case law consisting only of itself (because it was unknown to Anglo-Saxon law and is a "bizarre physically cruel punishment," *Solem*, 463 U.S. at 307 (Burger, C.J., dissenting)), or whether *Weems* is just one of a larger subset of cases involving "manifestly unjust" sentences. Furthermore, this Court is not required, in the present case, to refer to the "objective factors" recommended by the Court in *Solem* for measuring the proportionality of a sentence (consider (i) nature of offense and harshness of penalty, (ii) sentence imposed for same crime in other jurisdictions, and (iii) sentence imposed on other criminals in same jurisdiction, 463 U.S. at 291-2). Apart from the capital cases, the crux of the proportionality debate among the Justices involves the propriety of reviewing sentences of long-term incarceration. Although the eighth amendment proscribes "excessive" fines, and the Court might apply proportionality analysis to fine sentences, *Solem*, 463 U.S. at 289, Sato can cite to no authority for his claim that he is the victim of a manifestly unjust sentence. Simply put, even the most thorough exegesis of the proportionality cases could not manufacture an argument for Sato. Because we are unaware of any precedent supporting the position advanced by Sato, we conclude his proportionality argument must fail when the sentence of fine imposed by the district judge falls well within statutory parameters.

Even if we were inclined to make imperfect comparisons with "other jurisdictions," we note that under Illinois law the willful failure to file state income taxes is punishable as a Class 4 felony, Ill. Ann. Stat. ch. 120 ¶ 13-1301, and subject to a $10,000 fine for each offense. Ill. Ann. Stat. ch. 38 ¶ 1005-9-1. We believe the penalties authorized by state and federal law reflect the serious breach of public duty legislatures attribute to the willful failure to file taxes.

For the reasons set forth above, we affirm the district court's judgment of conviction and sentence.

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EXHIBIT C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
May 15, 1987.

Before
Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK E. EASTERBROOK, Circuit Judge
Hon. ROBERT A. GRANT, Senior Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 86-2197 vs.

JOSEPH Y. SATO,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 86 CR 157-1 - Nicholas J. Bua, *Judge*.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-mentioned case by defendant-appellant, no judge in active has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.